

THE FOURTH BRANCH OF GOVERNMENT? YOU BET.

Peter Schrag

Visiting Scholar
Institute of Governmental Studies

Working Paper 2001-3

Working Papers published by the Institute of Governmental Studies provide quick dissemination of draft reports and papers, preliminary analysis, and papers with a limited audience. The objective is to assist authors in refining their ideas by circulating results and to stimulate discussion about public policy. *Working Papers* are reproduced unedited directly from the author's page.

The Fourth Branch of Government? You bet.

Peter Schrag*

By now, it's generally recognized that direct democracy – and particularly the initiative process – has become increasingly important as a policy-making instrument in the United States. Some 24 states have it in one form or another, and there have been efforts to write it into the constitutions of several others. More important, in the past three decades, record numbers of initiatives have been circulated and have qualified for the ballot, particularly in Colorado, Arizona and the high-initiative states of the West Coast. Those initiatives have dealt with virtually every fundamental public issue one can think of: from ending affirmative action, curtailing bilingual education, toughening criminal sentences, establishing legislative term limits, limiting spending and capping taxes to permitting casino gambling on Indian reservations, increasing the minimum wage, imposing new environmental regulations, creating new parks and increasing support for public education. It also includes some, like physician-assisted suicide, that one wouldn't think of.

As that list indicates, while the contemporary wave of ballot measures, and particularly those following – and often prompted by -- passage of California's Proposition 13 in 1978, came disproportionately from the right, the left has become increasingly adept in the process and, in many instances as well financed. The big news last fall was that voters rejected vouchers, both in California and in Michigan, generally supported increased funding of more liberal funding formulas for schools, and continued the remarkable success that Bill Zimmerman and his colleagues have had in liberalizing state drug laws.

Nationally, 396 initiatives appeared on statewide ballots in the 1990s; 289 in the 1980s. The only similar period was in the decade between 1911 and 1920, when 291 were proposed.¹ In California, to cite just one big state, nine measures made it to the ballot in the 1960s, 22 in the 1970s, 45 in the 1980s and 62 in the 1990s. Given the small number that made it to the ballot last November, and the surprisingly few now in circulation, it's possible, maybe as a result of our general prosperity, that that sharply ascending curve may have dipped, at least for the moment.

But don't count on it. After 1990, when California voters rejected a large percentage of the great glut of stuff they were then confronted with, there were predictions that the electorate was having no more of that. And then, of course, the numbers started right up again. In Oregon last November, voters were confronted with 19 initiatives and hundreds of pages of ballot materials.

* Peter Schrag, was for 19 years the editorial page editor of the Sacramento Bee for which he continues to write a weekly column. He is the author of *Paradise Lost: California's Experience, America's Future* (1998).

¹ (Information compiled by the Initiative and Referendum Institute, Washington, D.C.)

In states like California, the impact of those ballot measures on public policy generally, and particularly on public services and infrastructure, has been enormous. Homeowners are now assured that they will not get any unpleasant surprises in their property tax bills. But after five boom years, we are just now beginning to recover from two decades of spending restrictions and tax limitations. Within the next couple of years, for example, California's per-pupil school spending, which was fifth or sixth in the nation in the mid 1960s, may get back up to the national average, itself not an adequate level when compared to the other large industrial states. It's particularly inadequate in a diverse, high-cost state like California. Five years ago we were 41st. And the counties have not yet recovered.

And of course, it's had a broader impact both on legislative policy, which has been increasingly sensitive to what voters have done or may do in the future, on initiatives in other states, and on national policy, which, on things like the restrictions on services to immigrants in the original welfare reform bill, and on tax limitations, has often reflected voter-enacted state measures. More important, perhaps, has been the effect on the political process itself. In states like California the basic fiscal and governmental structure has changed, shifting far greater authority to the state government, more or less eviscerating the local power to tax, and thus confounding accountability not only for voters, but often even for those – government officials, journalists, academics – who are professionally engaged with the process. Who is responsible for mitigating school overcrowding? Was it the district that overspent its budget or did the governor and legislature fail to come through with the promised money? How does the state's school finance system work? Why, with all that property tax, can't city hall keep the streets paved? (City hall, of course, no longer controls the property tax). More important, virtually all initiatives circumscribe the power of state and local elected officials, and often their willingness, to deal with new problems. That in turn has exacerbated voter frustration – already high anyway – with elected politicians and officials, which, in turn, increases the propensity to resort ever more to institutions, like the initiative and referendum, that bypass those politicians. Initiatives tend to beget initiatives.

In addition, tax limitation measures like Proposition 13 have skewed the local planning process. Because the property tax is now so limited, planners and city councils go after sales tax payers – big box retailers, shopping malls, auto malls – and, other things being equal, pay less attention to an attractive balance between housing and high-end employers in electronics or other high-tech industries which tend to require more in services than they return to the local treasury in higher property taxes. Conversely, because assessments only change when property is transferred – and sometimes not even then – measures like Proposition 13 and its progeny have tended to reduce turnover and stabilize neighborhoods.

Most fundamentally, the initiative has changed the quality and the institutional character of the legislature itself. The big driver has been term limits: In California three two-year terms in the Assembly, two four-year terms in the Senate. Freshman members now chair crucial policy committees, speakers last no more than two years, and almost everyone begins looking for the next job from the moment he or she arrives. In many places, the capitol is now the state's plushiest bus depot, where some people have just arrived, some are just about to leave, and few stay very long. Equally important, in an effort to curb bloated staffs and reduce the number of political hacks, California's

Proposition 140 sharply reduced the legislature's own budget. But what it did instead was drive out the policy people and eviscerate the staff of the non-partisan and highly respected legislative analyst. The hacks are still there. Although it's impossible to prove, it's at least conceivable that California's electricity deregulation mess would never have happened without term limits.

Lets turn for a moment to some other issues. In the past decade the so-called initiative industrial complex – the network of consultants, direct mail specialists, petition gathering firms, pollsters, media firms – has become a familiar part of the political landscape. And so, of course, has the growing amount of money involved. While money and paid political operatives have played a role almost from the beginning, the process was conceived as an instrument of citizen action. It was to comprise two hurdles: qualifying a measure for the ballot and getting it passed. But in an era when, on the one hand, it's nearly impossible in most states to qualify anything for the ballot without paid petition circulators and, on the other, easy for deep pockets initiative sponsors to qualify almost anything, the first hurdle becomes meaningless as a test of citizen commitment: Instead it becomes a barrier to it. At the same time, it becomes an open invitation to almost anyone who, for reasons of ideology or economic self-interest or political advantage or simple vanity wants to become an instant player. In Oregon last fall, one man, Bill Sizemore, who has become a sort of one-stop-shopping conglomerate – as developer, sponsor, and campaign organization -- qualified six measures for the ballot. In the process, he forced the governor to change his own legislative priorities to fight the most draconian of Sizemore's proposals. This is indeed a fourth branch.

Scholars like Daniel Lowenstein, Elizabeth Garrett and Elisabeth Gerber contend, more or less correctly, that while a large money advantage is often sufficient to defeat an initiative, it's rarely been sufficient by itself to pass one. But without money – the money of self-interested politicians and political parties, or of insurance companies, or Silicon Valley millionaires, or labor unions -- initiative proponents can't get to the table at all. Gerber has found that without other resources, the groups she defines as economic interests can rarely use their financial power alone to prevail at the ballot box. But in 1998, a coalition of well-heeled gambling interests seeking authority to run electronic slots in reservation casinos, spent \$65 million in California to prove they were poor Indians; Nevada gambling interests spent \$25 million in their unsuccessful attempt to beat them. It would be hard to describe this battle as anything but a fight between large economic interests.

Increasingly, moreover, the definitions become blurred and the groups confused: Is the California Republican party, which bankrolled the campaign to pass Proposition 209, the measure that banned racial and gender preferences in public education and contracting, a citizens' group? Is U.S. Term Limits, which is funded almost entirely by deep, conservative pockets (and won't disclose how much it gets from whom)? Are the public employee unions? Last November, the Silicon Valley venture capitalists and other proponents of Proposition 39, which lowered the margin required to pass local school bonds from 67 percent to 55 percent, outspent their opponents at the Howard Jarvis Taxpayers by roughly nine to one -- \$27 million to \$3 million. In the process they managed to befuddle enough voters – most of whom thought it had something to do with fiscal accountability, not with making it easier to approve bonds – to narrowly pass it. Is Oregon's Bill Sizemore a citizens' group?

The defenders of the initiative process often contend that the involvement of big money doesn't make it any different from representative politics. But one of its original justifications was precisely that. As the *Sacramento Bee* editorialized back in 1913, shortly after Hiram Johnson and the Progressives wrote the initiative, referendum and recall into the California constitution: "the money changers – the legions of Mammon and Satan – these have been lashed out of the temple of the people."² And because the initiative is subject to so many fewer institutional constraints, and because, initiatives are, in most instances, far harder to repeal and amend – in California, it's impossible unless the measure itself allows for it – the initiative structure actually makes the role of money much more dangerous.

Scholars like Arthur Lupia³ contend that while voters rarely have time to read the texts of initiatives and while initiative fights are dominated by 30-second TV ads and oversimplified mailers, voters get clear enough signals when they know who backs and opposes a measure and that, as others have argued, they rarely regret the votes they've cast. But the conventional legislative process, for all the logrolling that sometimes accompanies it, is usually subject to a whole range of institutional checks that the initiative is not-- committee hearings, two house agreement, executive veto, as well as the intrinsic legislative impulse to compromise and accommodate as many sides and interests as possible. None of that occurs in direct legislation, which is a winner-take-all process that, by its very nature, is rarely respectful of political minorities. In making their decisions, the voters have no technical experts at their disposal; they don't have the time to read the fine print, sometimes running to many thousands of words of legal language, behind the advertising slogans for and against particular measures; don't have to record their votes, much less confront those who believe they've been damaged by those votes; can't be run out of office if they make serious errors; are not accountable for the consequences to their fellow citizens or the public weal. Those differences have led some scholars – the late Julian Eule of UCLA most prominent among them -- to argue that in the absence of other checks, the courts, in reviewing the constitutionality of initiatives should apply *stricter* scrutiny than they do to conventional legislation.⁴

In addressing the question of whether the initiative has become the fourth branch of government, perhaps the most telling element is the extent to which the process, once regarded as something of an exceptional safety valve – something outside the conventional political process – has become part of it. As suggested above, the same interest groups that were to be checked by direct democracy – insurance companies, gambling interests, trial lawyers, labor unions, tobacco companies, even the Southern Pacific Railroad before its demise – have become major players. And so, of course, have the elected politicians and those seeking public office: California Gov. Pete Wilson, who successfully used Propositions 187, the immigration initiative and Proposition 194, the three strikes measure, as a wedge in his 1994 campaign for re-election and tried to use Proposition 209 in his abortive run for the presidency in 1995-6, is probably the best known. But there have been others: then-Secretary of State Jerry Brown with political reform in the early 1970s, former Attorney General John Van DeKamp with campaign

² *Sacramento Bee*, April 5, 1913. p. 32

³ Arthur Lupia, *The Democratic Dilemma: Can Citizens Learn What They Need to Know?* (1998)

⁴ Julian N. Eule, "Judicial Review of Direct Democracy," 99 *Yale Law Journal* 1503 (1990).

reform and moderate term limits in his unsuccessful pursuit of higher office in the 1980s. In addition, the threat of initiatives can drive the conventional political process. By gathering enough signatures to qualify a measure expanding the number of charter schools and liberalizing the rules under which they could be set up, Silicon Valley millionaire Reed Hastings (in 1998) put enough pressure on the California Teachers Association to bring them to the table and agree to a somewhat more moderate version of the same plan. That's not necessarily bad – indeed, it comes close to the kind of indirect initiative process that some states have and that's now being proposed by reform groups in California. But if you add to that the very evident fact that elected politicians like Bill Clinton and Gray Davis now rely increasingly on overnight polls, focus groups and other instant voter surveys – the politician's daily plebiscite -- it indicates the extent to which the two seem increasingly to become part of the same continuum: To paraphrase Clausewitz: the initiative has become the extension of politics by other means. All of which seems to reinforce the near-certainty that, regardless of what courts and legislatures may otherwise do, the initiative, which was nearly dormant forty years ago has become an important part not only of policy making but of the public consciousness.

Given that fact and the corresponding impact of ballot measures in restricting the prerogatives – and the careers -- of elected government officials, it's hardly surprising that there would be increasing attempts to restrict the process as well. The most pervasive of those career-restricting measures, of course, have been legislative term limits, which have been written into the constitutions of 18 states, in all but one case through voter initiatives. But there are countless others as well, particularly in the area of campaign finance reform. Some of those reforms have been struck down by the courts, as have all initiative-based attempts to impose congressional term limits. But in state after state, legislators, sometimes backed by special interest groups, have been seeking ways – both on good policy grounds, and on grounds of self-interest, to impose greater checks on the process.

The most common have been attempts to shorten the time allowed to collect signatures or to require that some signatures be collected in every county. In a number of western states, voters have approved ballot measures, pushed hard by hunting and gun groups that either prohibit or severely curtail initiatives protecting wildlife. In Utah, the so-called "Cowboy Caucus" managed to get voter approval for Proposition 5, a constitutional amendment requiring that all future ballot measures protecting wildlife be passed with a two-thirds vote. The amendment was sold as a conservation measure; in the words of Wayne Pacelle of the Humane Society, "the advertisements (for Proposition 5) said not a word about the supermajority requirement." For proponents of the initiative who argue that the voters always know what they're voting on, the irony here ought to be obvious.⁵

More important, there are increasing indications that the courts are becoming more active in checking the excesses of initiative making, and particularly in enforcing the requirement, common to most initiative states, that ballot measures be confined to a

⁵ Wayne Pacelle, "The Animal Protection Movement: A Modern-Day Model Use of the Initiative Process," in-----.

single subject.⁶ Although the standards and interpretations have varied widely, from the Florida court's very restrictive readings to California's heretofore generally tolerant ones, even the California court seems now to be sending signals that it will give measures stricter review. In December 1999, it knocked a measure off the ballot that, in an effort to get voter support for something they weren't particularly interested in, combined changes in the state's redistricting system with caps on legislative salaries, a clear violation of the single subject rule but one that might have passed muster a decade before. In his majority opinion, Chief Justice Ron George seemed to suggest precisely such a change of course. Alluding to law review criticisms of the court's alleged failure to enforce the single subject rule, he declared that "the rule is neither devoid of content nor as 'toothless' as some legal commentaries have suggested."⁷ In the meantime, the federal courts have struck down initiative-based attempts to write congressional term limits into the U.S. Constitution; have overturned ballot measures in Oregon and Colorado that sought to restrict homosexual rights; struck down most of California's Proposition 187, which sought to deny schooling and other services to illegal aliens and their children, on campaign finance reform and, more recently, the voter initiative establishing a "blanket" primary. (Though when it comes to campaign reform efforts, the courts have given equally strict scrutiny to legislative acts as to those imposed by initiative). Most high-profile initiatives, however – on taxation, on legislative term limits, on affirmative action, on criminal sentencing, on environmental regulation, on bilingual education – have survived pretty much intact. But because some were temporarily blocked in trial courts and, in one case, by a three judge appellate court panel, there's been considerable backlash, including in some cases calls for impeachment of judges or for requiring three-judge district court panels in cases involving the constitutionality of voter-enacted laws. That's led scholars like Kenneth P. Miller to warn that "as courts enforce constitutional norms and invalidate initiatives at a high rate, the public may become increasingly frustrated and may look for ways to undermine the courts' independence."⁸

On the other side of this coin is the simple fact – the one that stares all would be initiative-process reformers in the face – that the same courts, notwithstanding the complaints about judicial activism coming from initiative defenders, have given the process great deference and often on similar grounds. That deference goes back to 1912 when the U.S. Supreme Court ducked the most fundamental question --- Is direct democracy a violation of the guarantee clause? -- ruling that this is a political, not a legal issue and thus beyond its jurisdiction.⁹ (Interestingly enough, in separate decisions, the Oregon courts ruled that since – in that state – the legislature could amend or repeal statutory initiatives after they pass, the initiative process did not violate the guarantee clause. Inferentially, that begs a question in states like California, where the legislature

⁶ See, e.g. Kenneth P. Miller, "Courts as Watchdogs of the Washington State Initiative Process," *University of Seattle Law Review* (Forthcoming).

⁷ *Senate of the State of California v. Jones*, 21 C4th 1142. See also Gerald F. Uelmen, "Taming the Initiative," *California Lawyer*, August 2000. p. 46. How far that goes, of course, is anyone's guess, since state judges generally are subject to periodic reconfirmation votes. Thus, striking down a hot button issue, particularly one approved by a substantial majority, leaves the judge feeling, as former California Supreme Court Justice Joseph Grodin said, as if he's sitting with an alligator in his bathtub.

⁸ Kenneth P. Miller, "Judging Ballot Initiatives: A Unique Role for the Courts," Paper presented at the 2000 Annual Meeting of the Western Political Science Association, San Jose, CA., March 24-26, 2000.

⁹ *Pacific States Telephone and Telegraph Co. v. Oregon* 223 U.S. 118 (1912).

has no such authority). Since then the Supreme Court has ruled that the First Amendment prohibits states from banning paid signature gatherers, and prohibits them from requiring that they identify themselves by name, or even from having to be voters in the states in which they operate.¹⁰ Given the fact that the electorate loves the process – according to polls, the voters have far more confidence in policy making at the ballot box than through representative state government – that leaves reformers few choices other than requiring fuller and faster disclosure of who backs, who funds and, where possible, who opposes any given measure.

The problem in this debate, as with so many other controversies surrounding the initiative process, is that there are no normative criteria beyond the Constitution's general protections for due process, free speech and minority rights. The great latitude that the courts permit in some states on things like single subject would be rejected out of hand in others. Most states permit some sort of post-election legislative amendment, even repeal, of statutory initiatives, but California does not. Some, which have the indirect initiative, formally give legislatures a chance to act before a measure goes on the ballot; some do not.

The list of unresolved questions runs on and on. And on all these questions, the states vary widely: What's a reasonable threshold for signatures – how many should be required in what period of time and what's a reasonable relationship between them? Who should have the authority to write the ballot title and summary, which is where many voters get their only information about a measure, and which are therefore often crucial in close elections, and what checks should there be on that authority? In many cases, the first action in a court comes from a dispute over how the appropriate state official has captioned a measure. In some states, no appeal to the courts is allowed. And what is the difference between amending the constitution by initiative (permitted in states like California) and revising it by initiative, which is not permitted? Is the initiative itself a normative element of American democracy or an increasingly worrisome aberration?

If you like the process, not just in theory but as it's now used – if you like the results -- you are likely to be much more restive if the legislature attempts to make access to the ballot more difficult. If you don't like it, you may feel that the courts have been far too obeisant to majority power, not just on single subject, but in their failure to protect minorities against majoritarian assaults on things like affirmative action and bilingual education. Conservative critics who attack judges for overturning voter-approved restrictions on schooling or other public services for illegal aliens as thwarting the will of the people are not quite as certain when it comes (for example) to the wave of successful initiatives legalizing the medical use of marijuana.

Alongside those questions there are still others: As Bruce Cain and Kenneth Miller have pointed out,¹¹ there is implicit disagreement even among supporters of the process between those who regard it as a progressive safety valve against legislative malfeasance or inertia and those who see it as a populist alternative to all representative government. Miller also argues, quite cogently, that it's the populist-

¹⁰ *Meyer v. Grant*, 486 U.S. 414 (1988); *Buckley v. American Constitutional Law Foundation* (1999).

¹¹ In a forthcoming paper, "The Populist Legacy: Initiatives and the Undermining of Representative Government."

oriented measures – those that challenge or limit established institutions – that have run into particular difficulties in the courts.¹²

As the power of our new information technologies increases, as on-line voting and (probably) on-line petition signature collection become real possibilities, and as reliance on unmediated media – talk shows, the Internet, e-mail – grows, they will create still greater public restiveness about the relatively slow and seemingly unresponsive traditional institutions not only in government but in other public institutions and services as well. That makes the normative questions about the process ever more important. In his recent book, *Democracy Derailed*,¹³ Washington Post columnist David Broder, among our most sophisticated and thoughtful political journalists, even predicts that we'll soon get some form of direct democracy at the national level. Whether or not that prediction is correct, he's surely right in his finding that in state after state, voters show widespread disdain for their legislatures. Broder says that when he asked Oregon voters, who twice balloted on physician-assisted-suicide initiatives, whether such a fundamental ethical issue should simply be subject to the decision of a 50 percent-plus-one majority, "they looked at me like I was crazy." How else to decide something of this importance? Here is a whole generation raised on the speed, responsiveness and inter-activity of the web and weaned on the unmediated and inherently anti-establishment media of the chat room and the talk show confronting the deliberate nature, the slowness and, often, the non-responsiveness of conventional government. That growing dichotomy and the restiveness it produces is something we'd better all pay attention to. The initiative process is not going away; if anything, it will become a larger factor.

¹² Miller, "Courts as Watchdogs..." supra.

¹³ Broder, *Democracy Derailed: Initiative Campaigns and the Power of Money* (2000).